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CRIMINAL LOCAL RULES

I. SCOPE, PURPOSE AND CONSTRUCTION

1-1. Title.

These are the Local Rules of Practice in Criminal proceedings before the United States District Court for the Northern District of California. They should be cited as "Crim. L.R. ____."

2-1. Purpose and Construction.

These Rules are promulgated pursuant to 28 U.S.C. § 2071 and FRCP 57. They supplement the Federal Rules of Criminal Procedure and shall be construed so as to be consistent with those Rules. The provisions of the Civil Local Rules of the Court shall apply to criminal actions and proceedings, except where they may be inconsistent with these criminal local rules, the Federal Rules of Criminal Procedure or provisions of law specifically applicable to criminal cases.

Cross Reference

See Civil L.R. 1-5(i) "*General Orders*" and Civil L.R. 1-5(m) "*Standing Orders of Individual Judges*."

2-2. Definitions. Unless the context requires otherwise, the definitions contained in Civil L.R. 1-5 apply to these local rules.

(a) **FREvid.** "FREvid" means the Federal Rules of Evidence.

(b) **Probation Officer.** "Probation Officer" refers to a United States Probation Officer appointed by the United States District Court.

2-3. Certificate of Service.

(a) **Party Certificate of Service.** Whenever these local rules or other provision of law requires any pleading or paper which is presented for filing in a criminal case to be served upon any party or person, it shall bear on it or have attached to it a certificate of service in a form which complies with Civil L.R. 5-4(a).

(b) **Clerk's Certificate of Service.** Unless the Judge or these local rules require otherwise, any written order of the Court in a criminal case shall bear on it or have attached to it a certificate of service by the Clerk.

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2-4. Lodging Copy for Chambers.

Unless the Court orders otherwise, an extra copy of any document filed in a criminal case marked for “Chambers,” shall be lodged pursuant to Civil L.R. 5-2(b).

II. PRELIMINARY PROCEEDINGS

5-1. Criminal Case Proceedings before Assignment to a District Judge.

(a) **Calendar for Proceedings in Criminal Cases Before Assignment.** Each courthouse of this District shall maintain a criminal calendar to hear any matter in a criminal case which has been assigned to that courthouse and which arises before the case is assigned to a District Judge.

Cross Reference

See Crim L.R. 18-1(a),(b) or (c)

(b) **Proceedings before Magistrate Judge prior to Assignment.** At each courthouse a Magistrate Judge shall be designated to hear and decide matters arising before the case has been assigned to a District Judge in criminal cases which have been assigned to that courthouse. The designated Magistrate Judge is empowered to hear and decide any matter on that calendar unless a federal statute or federal rule requires that the matter be decided by a District Judge.

(c) **Initial Appearance after Arrest.** Whenever a person is arrested in this District for a federal offense, the person shall be brought before the nearest available Magistrate Judge. The Magistrate Judge before whom the person is brought shall preside over the initial appearance in accordance with FRCrimP 5. All subsequent proceedings shall be conducted at the courthouse where the case has been assigned pursuant to Crim. L.R. 7-1.

(d) **Proceedings before a District Judge prior to Assignment.** When a matter arises in a criminal case before the case has been assigned to a District Judge which a federal statute or federal rule requires be presented to or decided by a District Judge, it shall be presented to the General Duty Judge for the courthouse or, if unavailable, to the General Duty Judge at any other courthouse.

Cross Reference

See Civil L.R. 1-5(j) "General Duty Judge."

III. INDICTMENT AND INFORMATION

6-1. Impanelment Of Grand Jury.

The General Duty Judge of each courthouse of this District is empowered to impanel one or more grand juries as the public interest requires. Upon a determination by a General Duty Judge to impanel a grand jury for that courthouse, he or she shall summon a sufficient number of legally qualified residents of the counties served by that courthouse pursuant to Civil L.R. 3-2 to satisfy the requirements of FRCrimP 6(a).

6-2. Grand Jury Administration.

(a) Motions Pertaining to Composition or Term of Empaneled Grand Jury.

A request by the government or a grand juror for an order pertaining to service on or the term of an impaneled grand jury shall be made by *ex parte* motion or request to the Judge who impaneled the grand jury. If that Judge is unavailable within the meaning of Civil L.R. 1-5(n), the motion or request shall be made to the General Duty Judge of the courthouse in which the grand jury sits. Such motions or requests may pertain to matters such as:

- (1) A request by a member of a grand jury or by the government that a grand juror be excused;
- (2) A request by the government to appoint an alternate grand juror;
- (3) A motion to extend the term of a grand jury.

(b) Motions Regarding Grand Jury Process or Proceedings. Any government motion regarding those parts of the grand jury's process or proceedings or in aid of its process or proceedings which must be conducted in secret pursuant to FRCrimP 6, may be made under seal by *ex parte* motion to the General Duty Judge of the courthouse at which the grand jury sits. Unless otherwise ordered by the General Duty Judge pursuant to *ex parte* request, any such motion filed by a private party shall be accompanied by proof of service of the motion upon the office of the United States Attorney for this District.

7-1. Assignment of Criminal Case.

(a) Designation in Caption of Pleading. In the caption of each complaint, indictment or information immediately following the identification of the pleading, the government shall identify the courthouse to which the action should be assigned pursuant to Crim. L.R. 18-1. After a complaint, indictment or information has been filed in this District and assigned to the appropriate courthouse pursuant to Crim. L.R. 18-1, the Clerk shall assign it to a District Judge pursuant to the Assignment Plan of the Court. The case shall also be assigned to the designated criminal calendar Magistrate Judge at that courthouse.

(b) Proceedings before Magistrate Judge after Assignment. After a case has been assigned to a District Judge pursuant to Crim. L.R. 7-1(a), the criminal calendar Magistrate Judge may conduct the following proceedings as deemed appropriate:

(1) Appoint counsel;

(2) Appoint an interpreter;

(3) Conduct an arraignment and schedule an appearance before the assigned District Judge in no less than 11 nor more than 18 days (except in cases under FRCrimP 20 or 40 (See Crim. L.R. 20-1 and 40-1));

(4) Accept or enter a plea of not guilty;

(5) Conduct a probation or supervised release preliminary revocation hearing;

(6) Hear and determine motions or matters regarding release or detention;

(7) Set a schedule for disclosure of information pursuant to FRCrimP 16;

(8) In a case transferred to this District under FRCrimP 20, order a presentence report and schedule a date for arraignment, plea and sentencing consistent with the time necessary to effect the transfer;

(9) Order a presentence report where a defendant who is represented by counsel has agreed to plead guilty;

(10) In cases pending before the Magistrate Judge, declare forfeiture of bail and conduct proceedings pursuant to FRCrimP 46(e);

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(11) After issuance of an order of forfeiture, enforcement, remission or exoneration by a District Judge pursuant to FRCrimP 46(e), conduct further proceedings pertaining to the bond as may be referred by the District Judge;

(12) Conduct proceedings under FRCrimP 40;

(13) Conduct proceedings for extradition;

(14) Conduct such other proceedings which may be performed by a Magistrate Judge as ordered by the assigned District Judge.

8-1. Notice of Related Case in a Criminal Action.

(a) **Notice Requirement.** Whenever a party to a criminal action pending in this District knows or learns that the action is related to a civil or criminal action, which is or was pending in this District, that party shall promptly file a “Notice of Related Case in a Criminal Action” with the Judge assigned to the earliest filed action, shall lodge a copy of the notice with the chambers of each Judge assigned to each related case and shall serve all known parties with a copy of the notice.

Commentary

A Judge's involvement in any pre-indictment miscellaneous proceeding (e.g., issuance of search warrant) is not a basis for assignment of any resulting criminal action to that Judge as a related case.

(b) **Definition of Related Case for Criminal Action.** Any criminal action is related to another pending civil or criminal action when:

(1) Both actions concern one or more of the same defendants and the same alleged events, occurrences, transactions or property; or

(2) Both actions appear likely to entail substantial duplication of labor if heard by different Judges or might create conflicts and unnecessary expenses if conducted before different Judges.

(c) **Content of Notice.** A Notice of Related Case in a Criminal Action shall contain:

(1) The title and case number of each related case;

(2) A description of each related case;

(3) A brief statement of the relationship of each action according

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to the criteria set forth in Crim. L.R. 8-1(b);

(4) A statement by the party with respect to whether assignment to a single Judge is or is not likely to conserve judicial resources and promote an efficient determination of the action.

(d) Response to Notice. No later than 5 days after service of a Notice of Related Case in a Criminal Action, any party may serve and file a statement to support or oppose the notice. Such statement shall specifically address the issues in Crim. L.R. 8-1(b) and (c).

(e) Related Case Order. After the time for filing support or opposition to the notice has passed, the Judge assigned to the earliest-filed case shall issue an order that indicates whether the later-filed cases is related or not, and if the case is related, whether the later-filed case is to be reassigned to that Judge. After the Judge issues the related case order, the Clerk shall reassign the case if ordered to do so and shall serve a copy of the order upon the parties and the assigned Judge in the later-filed case.

IV. PREPARATION FOR DISPOSITION BY TRIAL OR SETTLEMENT

11-1. Voluntary Settlement Conference.

(a) **Joint Request for Referral.** At any time prior to the final pretrial conference, the attorney for the government and the attorney for a defendant, acting jointly, may file a stipulation requesting the assigned Judge to refer the case to another Judge or Magistrate Judge to conduct a settlement conference. The request must be in writing and it must be signed by the attorney for the government, the defense counsel and the defendant. In a multiple defendant case, all defendants need not join in the request in order for the assigned Judge to refer the case pending against a stipulating defendant.

(b) **Order of Referral.** Upon a request made pursuant to Crim. L.R. 11-1(a), the assigned Judge may, in his or her discretion, refer the case to another Judge or Magistrate Judge who has agreed to conduct settlement conferences in criminal cases. In conjunction with the referral, the assigned Judge may order the pretrial services officer of the Court to provide a report of any prior criminal proceedings involving the defendant to the parties and the settlement Judge.

(c) **Conduct of Settlement Conference.** The role of the settlement Judge is to facilitate a voluntary settlement between parties in a criminal case. The settlement Judge shall schedule a conference taking into consideration the trial schedule in the case. The attorney for the government and the principal attorney for the defendant shall attend the conference. The defendant shall not be present at the conference, but shall be present at the courthouse for consultation with defense counsel. At least 5 days before the settlement conference, the Deputy Clerk for the settlement Judge shall notify the marshal to bring a defendant who is in custody to the courthouse to be available for consultation with his or her defense counsel. The settlement conference shall not be reported. Neither the settlement Judge, nor the parties nor their attorneys shall communicate any of the substance of the settlement discussions to the assigned Judge or to any other person. No statement made by any participant in the settlement conference shall be admissible at the trial of any defendant in the case. If a resolution of the case is reached which involves a change in the plea, the settlement Judge shall not take the plea.

(d) **Withdrawal of Request for Referral.** Participation in a settlement conference is voluntary. Any party may unilaterally file a notice of withdrawal of its request at any time.

12-1. Pretrial Motions.

Unless good cause is shown, all defenses, objections or requests pursuant to FRCrimP 12, which are capable of determination without the trial of the general issue, must be raised by pretrial motion and noticed for hearing on or before the deadline set by the assigned Judge or Magistrate Judge for hearing all pretrial motions. Motions shall be noticed in accordance with Crim. L.R. 47-1.

16-1. Procedures for Disclosure and Discovery in Criminal Actions.

(a) **Meeting of Counsel.** Within 10 days after a defendant's plea of not guilty, the attorney for the government and the defendant's attorney shall confer with respect to a schedule for disclosure of the information as required by FRCrimP 16 or any other applicable rule, statute or case authority. The date for holding the conference can be extended to a day within 20 days after entry of plea upon stipulation of the parties. Any further stipulated delay requires the agreement of the assigned Judge pursuant to Civil L.R. 7-12.

(b) **Order Setting Date for Disclosure.** In the absence of a stipulation by the parties, a schedule for disclosure of information as required by FRCrimP 16 or any other applicable rule, statute or case authority may be set *sua sponte* by the assigned Judge or Magistrate Judge. If a party has conferred with opposing counsel as required by Crim. L.R. 16-1(a), the party may make an motion pursuant to Crim. L.R. 47-4 to impose a schedule for such disclosure.

(c) **Supplemental Disclosure.** In addition to the information required by FRCrimP 16, in order to expedite the trial of the case, in accordance with a schedule established by the parties at the conference held pursuant to Crim. L.R. 16-1(a) or by the assigned Judge pursuant to Crim L.R. 16-1(b), the government shall disclose the following:

(1) **Electronic Surveillance.** A statement of the existence or non-existence of any evidence obtained as a result of electronic surveillance;

(2) **Informers.** A statement of the government's intent to use as a witness an informant, i.e., a person who has or will receive some benefit from assisting the government;

(3) **Evidence of Other Crimes, Wrongs or Acts.** A summary of any evidence of other crimes, wrongs or acts which the government intends to offer under FREvid 404(b), and which is supported by documentary evidence or witness statements in sufficient detail that the Court may rule on the admissibility of the proffered evidence; and

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(4) Co-conspirator's Statements. A summary of any statement the government intends to offer under FREvid 801(d)(2)(E) in sufficient detail that the Court may rule on the admissibility of the statement.

16-2. Motion to Compel Discovery.

(a) Content of Motion. A motion to compel disclosure or discovery shall be accompanied by a declaration by counsel which shall set forth:

- (1)** The date of the conference held pursuant to Crim. L.R. 16-1(a);
- (2)** The name of the attorney for the government and defense counsel present at the conference;
- (3)** The matters which were agreed upon; and
- (4)** The matters which are in dispute and which require the determination of the Court.

17.1-1. Pretrial Conference.

(a) Time for Pretrial Conference. On request of any party or on the Judge's own motion, the assigned Judge may hold one or more pretrial conferences in any criminal action or proceeding.

(b) Pretrial Conference Statement. Unless otherwise ordered, not less than 4 days prior to the pretrial conference, the parties shall file a pretrial conference statement addressing the matters set forth below, if pertinent to the case:

- (1)** Disclosure and contemplated use of statements or reports of witnesses under the Jencks Act, 18 U.S.C. § 3500, or FRCrimP 26.2;
- (2)** Disclosure and contemplated use of grand jury testimony of witnesses intended to be called at the trial;
- (3)** Disclosure of exculpatory or other evidence favorable to the defendant on the issue of guilt or punishment;
- (4)** Stipulation of facts which may be deemed proved at the trial without further proof by either party and limitation of witnesses;
- (5)** Appointment by the Court of interpreters under FRCrimP 28;

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(6) Dismissal of counts and elimination from the case of certain issues, e.g., insanity, alibi and statute of limitations;

(7) Joinder pursuant to FRCrimP 13 or the severance of trial as to any co-defendant;

(8) Identification of informers, use of lineup or other identification evidence and evidence of prior convictions of defendant or any witness, etc.;

(9) Pretrial exchange of lists of witnesses intended to be called in person or by deposition to testify at trial, except those who may be called only for impeachment or rebuttal;

(10) Pretrial exchange of documents, exhibits, summaries, schedules, models or diagrams intended to be offered or used at trial, except materials that may be used only for impeachment or rebuttal;

(11) Pretrial resolution of objections to exhibits or testimony to be offered at trial;

(12) Preparation of trial briefs on controverted points of law likely to arise at trial;

(13) Scheduling of the trial and of witnesses;

(14) Request to submit questionnaire for prospective jurors pursuant to Crim.. L.R. 24-1(a), request for tax information pursuant to Crim.. L.R. 24-1(b), voir dire questions, exercise of peremptory and cause challenges and jury instructions;

(15) Any other matter which may tend to promote a fair and expeditious trial.

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V. VENUE

18-1. Intradistrict Assignment of Criminal Actions.

(a) **Assignment to San Francisco.** Unless otherwise ordered, the Clerk shall assign all criminal actions and proceedings involving offenses allegedly committed in the counties of Del Norte, Humboldt, Lake, Marin, Mendocino, Napa, San Francisco, San Mateo or Sonoma to a Judge assigned to the San Francisco Courthouse.

(b) **Assignment to Oakland.** Unless otherwise ordered, the Clerk shall assign all criminal actions and proceedings involving offenses allegedly committed in the counties of Alameda and Contra Costa to a Judge assigned to the Oakland Courthouse.

(c) **Assignment to San Jose.** Unless otherwise ordered, the Clerk shall assign all criminal actions and proceedings involving offenses allegedly committed in the counties of Santa Clara, Santa Cruz, San Benito or Monterey to a Judge assigned to the San Jose Courthouse.

(d) **Extradition.** The Clerk shall assign any extradition proceeding to the courthouse which, pursuant to Crim. L.R. 18-1, serves the county in which the defendant is a resident, or if not a resident, the county in which the defendant is physically present at the time the defendant is apprehended.

18-2. Intradistrict Transfer.

Upon a Judge's own motion or the motion of any party, unless the case was specially assigned pursuant to the Assignment Plan, a Judge may order the Clerk to transfer a criminal case to a different courthouse if it appears that the case was not properly assigned under Crim. L.R. 18-1(a), (b), (c) or (d) or that a transfer would be in the interest of justice based upon the convenience of the defendant and the witnesses and the prompt administration of justice.

Cross Reference

See 18 U.S.C. § 3236 (trial of homicide shall be in county in which the offense occurred).

20-1. Assignment, Plea or Sentencing under Rule 20.

Any criminal case transferred to this District pursuant to FRCrimP 20 shall be commenced in the courthouse which, pursuant to Crim. L.R. 18-1 (a), (b), or (c), serves the county in which the defendant is a resident, or if not a resident, the county in which the defendant is physically present at the time the defendant is apprehended.

VI. TRIAL

24-1. Questionnaire for Prospective Jurors.

Unless ordered otherwise by the assigned Judge, a party who has obtained approval from the Judge to submit a questionnaire to prospective jurors shall lodge a copy of the approved questionnaire with the Clerk of the assigned Judge at least 2 days before the date scheduled for jury selection.

24-2. Procedure for Exercise of Peremptory Challenges.

Peremptory challenges to which each party may be entitled under FRCrimP 24(b) shall be exercised in the manner directed by the assigned Judge. Generally, the government may exercise the first challenge, the defense may exercise the second challenge, the next by the government, the next two by the defense, and alternating in this fashion until the government exercises its sixth challenge and the defense its tenth.

24-3. Passing a Peremptory Challenge.

If a party passes a peremptory challenge it shall be counted as if exercised. If the opposing party also passes, the jury shall be deemed selected. If the opposing party exercises a challenge, the party who previously passed, may exercise any unused challenge.

VII. JUDGMENT

32-1. Scheduling of the Sentencing Hearing.

(a) **Setting the Date for Sentencing.** Unless referral is waived or delayed pursuant to Crim. L.R. 32-1(b) or (c), at the time of a finding of guilt or entry of a plea of guilty, the defendant shall be referred to the Probation Officer for this Court for investigation and preparation of a presentence report. Unless it determines otherwise, the Court shall set the defendant's sentencing hearing:

(1) no earlier than 75 days after the referral date, for an in-custody defendant; or

(2) no earlier than 95 days after the referral date, for an out-of-custody defendant.

Commentary

This local rule is designed to allow sufficient time for investigation and preparation of a presentence report and the identification and narrowing of issues requiring judicial resolution before sentencing. Pursuant to FRCrimP 32(a), at the time of a finding of guilt or entry of a plea of guilty for good cause shown, counsel may request the Court to adjust requirements set out by the various sections of Crim.L.R. 32 (e.g., shortening or lengthening the time between judgment and sentencing or modify the requirements regarding materials to be filed prior to sentencing.)

Offenses to which the sentencing guidelines are not applicable (offenses prior to November 1, 1987) shall also comply with the time limits established by this rule.

Cross Reference

See Crim.. L.R. 32-3 [Duty of defense counsel and defendant to report to probation office on the day of referral].

(b) **Immediate or Expedited Sentencing.** If the defendant waives his or her right to a presentence report and the Court finds that it is able to exercise its sentencing authority meaningfully without a presentence report, the Court may immediately sentence the defendant or set a sentencing hearing on an expedited schedule.

(c) **Delayed Referral and Sentencing.** For good cause shown, the Court may delay referral of the case to the Probation Officer. Upon referral, unless otherwise ordered, the time periods set forth in Crim. L.R. 32-1(a) shall apply.

(d) **Notification to Probation Officer.** On the day a defendant is referred to the Probation Officer, the Clerk shall transmit to the Probation Officer written notice of referral and of the date set for sentencing of the defendant.

32-2. Rescheduling the Date for Sentencing.

(a) **Stipulation or Motion.** At any time prior to filing the final presentence report, the parties may file a stipulation or a party may make a motion to change a date for the sentencing hearing in a case. The stipulation or motion shall be served upon the opposing party and the Probation Officer. The stipulation or motion shall contain:

(1) Good cause for the change;

(2) Certification that the moving party has conferred with opposing counsel and the Probation Officer and that those parties will be available on the changed date if the motion is granted;

(3) Certification that the moving party has conferred with the Courtroom Deputy Clerk for the assigned Judge and that the changed date is available on the calendar of the assigned Judge; and

(4) A proposed order.

(b) **Response or Opposition to Motion to Reschedule.** Any response or opposition to a motion to reschedule the date for a sentencing hearing shall conform with the requirements of Crim. L.R. 47-3(c).

(c) **Continuance by the Probation Officer.** In the event there is a delay in obtaining information necessary for completing the presentence report, the Probation Officer may make a *ex parte* request pursuant to Civil L.R. 7-11(c) that the date for sentencing be changed. The request shall include:

(1) Certification that the Probation Officer has conferred with counsel for the parties and the courtroom Deputy Clerk with respect to the new date; that the date is available for the parties and the hearing calendar of the assigned Judge or whether there is any objection to the change by a party; and

(2) A proposed order.

(d) **Effect of Rescheduling of Sentencing on Deadlines.** Unless otherwise stated, if the Judge grants a motion to change the date for sentencing, unless otherwise ordered, the deadlines set in Crim L.R. 32-3, 32-4 and 32-5 shall automatically adjust and be calculated from the new sentencing date.

32-3. Initiation of the Presentence Investigation.

(a) **Duty to Assist Probation Office Scheduling.** On the day the defendant is referred to the Probation Officer, the defendant's counsel (and, if the defendant is out of custody, the defendant as well,) shall immediately report to the Probation Officer for the purpose of assisting in the presentence investigation.

Cross Reference

FRCrimP 32(b)(2) (Right of defense counsel to notice and opportunity to attend interview).

(b) **Sentencing Information in Government's Possession.** Within 7 days after receiving a written request from the Probation Officer for information (e.g., indictment, plea agreement, investigative report, etc.), the attorney for the government shall respond to the request and may supply other relevant information. The attorney for the government shall serve a copy of the material on defense counsel, except material already in the possession of defense counsel.

(c) **Deadline for Submission of Material Regarding Sentence.** Any material a party wishes the Probation Officer to consider for purposes of the proposed presentence report shall be submitted to the Probation Officer at least 45 days before the date set for sentencing. The party shall serve a copy of the material on opposing counsel, except for material already in the possession of opposing counsel.

32-4. Proposed Presentence Report.

(a) **Distribution of Proposed Presentence Report.** Pursuant to FRCrimP 32(b)(6) at least 35 days before the date set for sentencing, the Probation Officer shall furnish to defense counsel (or *pro se* defendant) and to the attorney for the government, a proposed presentence report.

(b) **Parties' Response to Proposed Presentence Report.** Within 10 days after the proposed presentence report has been furnished pursuant to FRCrimP 32(b)(6), a party shall deliver to the Probation Officer and to opposing counsel a written response to the proposed presentence report which shall comply with Crim. L.R. 32-4(c).

(c) **Content of Response to Proposed Presentence Report.**

(1) **Statement of No Opposition.** If a party does not object to factual statements or computations of offense level under the guidelines of the United States Sentencing Commission, the party shall notify the Probation Officer in writing that the party has no objections under FRCrimP 32(b)(6).

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(2) Statement of Opposition. If Crim. L.R. 32-4(c)(1) does not apply, the written response required by Crim. L.R. 32-4(b) shall identify and address any objections to factual statements or guideline computations in the proposed report. The response shall not be filed with the sentencing Judge. Such objections must:

(A) Set out each objection to the proposed presentence report, including each material factual statement disputed and how that party's version of the facts differs from those stated in the proposed presentence report, as well as citation to material facts omitted from the proposed presentence report;

(B) Specifically cite the evidentiary support for that party's version of the material facts; and

(C) State any variation the party contends should be made from the guideline computation recommended in the proposed presentence report.

Commentary

This rule is intended to implement the informal process of identifying and narrowing issues that will ultimately require judicial resolution. Parties should be aware that the objections not raised to the Probation Officer may not be considered by the Court absent a showing of good cause. See FRCrimP 32-5(b)(6)(D).

(d) Presentence Conference with Probation Officer. If the response of a party contains objections, the party shall attend any meeting called by the Probation Officer pursuant to FRCrimP 32((b)(6)(B). If the presence of a party or parties is not feasible, the Probation Officer may conduct the conference telephonically.

Commentary

This rule does not mandate that a presentence conference occur. If the Probation Officer feels that one is not needed, the Probation Officer need not call such a conference. However, if the Probation Officer does call such a conference, attorneys must attend and participate.

Participants in the presentence conference process should consider disseminating documents by electronic means (e.g., by fax transmission) in order to speed dissemination of the proposed presentence report. Crim. L.R. 32-3 presumes that the U.S. Probation Offices in the Northern District of California will establish regulations and procedures for the expeditious disclosure of the proposed presentence report to the defendant, defense counsel and the attorney for the government.

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(e) Conference with In-Custody Defendant. If requested by the probation office and to the extent its available resources permit, the U.S. Marshal shall bring an in-custody defendant to a courthouse on a date scheduled for an initial or subsequent interview with the Probation Officer pursuant to FRCrimP 32 or for disclosure of the presentence report to the defendant pursuant to Crim. L.R. 32-4 and 32-5.

Commentary

This rule is designed to aid efforts by the Probation Officer to expedite meetings with defense counsel and the defendant and to reduce the cost of presentence interviews. It is contemplated that the Marshal would utilize any excess capacity to transport or hold a defendant in order to facilitate an interview.

32-5. Final Presentence Report.

(a) Final Presentence Report and Attachments. At least 14 days before the date set for sentencing, the Probation Officer shall disclose a copy of the final presentence report and recommendations to defense counsel (or a *pro se* defendant), attorney for the government and lodge a copy with the sentencing Judge. The final presentence report shall be accompanied by a separate enclosure containing any of the following documents:

(1) Plea agreement;

(2) Character reference letters;

(3) Victim-witness letters;

(4) Certification by the Probation Officer that the proposed and final presentence reports were disclosed to defense counsel (or *pro se* defendant) and the dates of those disclosures; and

(5) Any other matter for consideration by the Court which pertains to sentencing.

Commentary

The final presentence report shall include or contain an addendum setting forth objections that remain unresolved following the process set out in Crim. L.R. 32-4.

While this rule requires attachments to the final presentence report be in a separate enclosure, the Probation Officer may attach the materials to the copy of the final report which is furnished to the attorney for the government and attorney for the defendant, rather than in a separate enclosure. The Probation Officer does not need to supply a party with material which originated with that party.

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(b) Sentencing Memorandum. The parties may submit a sentencing memorandum addressing sentencing issues as set forth below and must submit a sentencing memorandum if a departure or evidentiary hearing is requested. Any sentencing memorandum shall be filed at least 7 days prior to the date set for sentencing and served upon the opposing party and the Probation Officer in such a manner that it is received on the day it is filed. If the sentencing memorandum requests a departure, the title of the memorandum shall state “Motion for Departure;” and if the sentencing memorandum requests an evidentiary hearing, the title of the memorandum shall state “Request for Evidentiary Hearing.” The sentencing memorandum shall contain the following:

(1) Unresolved Objections Identified in the Final Presentence Report. The sentencing memorandum need not reassert objections any party has made that are identified in the final presentence report as unresolved objections; however, a party’s sentencing memorandum may elaborate on objections identified in the final presentence report and shall indicate whether or not the party requests an evidentiary hearing to resolve any objection.

(2) Departures. Any party requesting a departure that has not been identified in the final presentence report must file a sentencing memorandum that states the sentence requested, the grounds for the departure, and the legal authority for the departure.

(3) Other Matters. The sentencing memorandum may include any other matter that a party believes should be considered in connection with sentencing.

Commentary

With the prior approval of the Court, the sentencing memorandum may be filed under seal.

(c) Reply to Sentencing Memorandum. A reply, if any, to the opposing party’s memorandum may be filed no later than 3 days prior to the date set for sentencing and served upon the opposing party and the Probation Officer in such a manner that it is received on the day it is filed. If a party requests an evidentiary hearing to resolve any issue raised in the reply or the opposing party’s sentencing memorandum, the title of the reply shall state “Request for Evidentiary Hearing.”

Commentary

If the sentencing memorandum is filed under seal, the reply to the sentencing memorandum must be filed under seal.

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(d) Evidentiary Hearing. If the sentencing memorandum or reply requests an evidentiary hearing, in addition to so stating in the title of the document, the pleading shall set forth:

- (1) The factual issues to be resolved at the evidentiary hearing;
and
- (2) The names of the witnesses to be called and a description of their proposed testimony.

(e) Judicial Notice of Evidentiary Hearing or Unsolicited Departure. If the sentencing Judge is considering departing for a reason not identified in the final presentence report or requested by a party or if the sentencing Judge decides to conduct an evidentiary hearing, the Judge shall notify the parties and the Probation Officer and may schedule a conference with the parties and the Probation Officer to decide any issues relating to the departure or evidentiary hearing. If the Court issues no notice of an evidentiary hearing, no evidentiary hearing will be held on the date set for sentencing.

Commentary

This local rule outlines the procedure for formal litigation relating to sentencing that follows the informal proceedings set out in Crim. L.R. 32-1 through 32-4. This rule anticipates that litigants will have undertaken in good faith to resolve objections informally with opposing counsel and the Probation Officer and thereby identified and narrowed the issues requiring judicial resolution. It seeks to avoid duplication of efforts by relieving litigants from reasserting in memoranda those objections of which the Court will be apprised by the final presentence report, but it requires objections to be raised in the informal process of Crim. L.R. 32-4 by imposing a requirement that good cause be shown before such an objection not previously made can be considered.

32-7. Sentencing Proceedings.

(a) Form of Judgment. After imposition of sentence, without unnecessary delay, the Court shall enter judgment on the form entitled “Judgment in a Criminal Case” adopted by the Administrative Office of the United States Courts.

(b) Statement of Reasons. The Court provides a statement of reasons pursuant to 18 U.S.C. § 3553(c)(1) when:

- (1) The Court completes and attaches the form entitled “Statement of Reasons” to the form of judgment entered pursuant to Crim. L.R. 32-7(a); or

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(2) The sentencing Judge states in open court the reason for imposing a sentence and orders the court reporter or recorder to prepare immediately a transcript of the proceedings, which the Clerk shall attach to the judgment form required by Crim. L.R. 32-7(a). The court reporter or recorder shall deliver a copy of the transcript to the Probation Officer.

(c) Record of Finding Regarding Accuracy of Presentence Report. When the sentencing Judge makes a finding with respect to the accuracy of the presentence report pursuant to FRCrimP 32(c)(3)(D), the Judge shall be deemed to have provided a record of the finding if he or she:

(1) Includes the finding in the statement of reasons pursuant to Crim. L.R. 32-7(b)(1) or (2); or

(2) Orders the Probation Officer to incorporate the finding in an addendum to the final presentence report, a copy of which shall be provided to the Court and the parties at least 3 days before the final presentence report is submitted to the Bureau of Prisons.

32-8. Confidential Character of Presentence Report.

(a) Disclosure of Presentence Reports and Related Records. A presentence report, probation, supervised release report, violation report and related documents to be offered in a sentencing or violation hearing are confidential records of the Court. Except as otherwise required by FRCrimP 26.2, authorized by statute, federal rule or regulation or unless expressly authorized by order of the Court, such records shall be disclosed only to the Court, court personnel, the defendant, defense counsel and the attorney for the government in connection with sentencing, violation hearings, appeal or collateral review.

(b) Request for Disclosure Under Circumstances Not Covered by Statute. Anyone seeking an order authorizing disclosure of a presentence report which is not authorized by statute, federal rule or regulation shall file a motion pursuant to Crim. L.R. 47-1 with the sentencing Judge or, if no longer sitting, with the General Duty Judge of the courthouse where the defendant was sentenced. Such motion shall state with particularity the reason disclosure is sought and to whom the report will be provided. No disclosure shall be made under this Crim. L.R. 32-8(b) except upon an order issued by this Court. The motion shall be served upon the defendant, last defense counsel of record, the attorney for the government and the Probation Officer of record.

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Commentary

Other than as allowed by any regulations of the Probation Office for disclosure (e.g., for disclosure to U.S. Marshal in the case of an absconding defendant or to other U.S. Probation Offices for purposes of supervision or other sentencings of the defendant; therapists with whom the defendant is engaged as a result of a court ordered study or condition of supervision; or U.S. Sentencing Commission pursuant to 28 U.S.C. § 994(w)), a presentence report should not be disclosed.

32.1-1. Revocation of Probation or Supervised Release.

(a) Petition for Revocation. The following procedures shall be followed with respect to any petition by a Probation Officer for revocation of probation or supervised release:

(1) The petition shall be filed and noticed for hearing before the sentencing Judge or sentencing Magistrate Judge. If the sentencing judicial officer is unavailable, the petition shall be presented to the General Duty Judge or Criminal Calendar Magistrate Judge for the courthouse where the probationer or releasee was originally sentenced;

(2) The petition shall be accompanied by a summons and proposed order that the probationer or releasee appear and show cause why probation or supervised release should not be revoked. Alternatively, the petition may request that the Court issue an arrest warrant. If a warrant is sought, the probation office shall recommend bail in a specified amount or that the probationer or releasee be held without release on bail; and

(3) Unless otherwise ordered, the Probation Officer shall serve a copy of the petition and order on the probationer or releasee, last known counsel of record and the attorney for the government.

(b) Preliminary Revocation Hearing. A preliminary hearing to determine whether or not there is probable cause to believe that a violation has occurred may be conducted by a criminal calendar Magistrate Judge. If the Magistrate Judge finds the existence of probable cause, the Magistrate Judge shall set the matter for a revocation hearing before the assigned Judge or sentencing Magistrate Judge.

(c) Appearance by Attorney for the Government. An attorney for the government may appear on behalf of the government at any proceeding to revoke probation or supervised release.

(d) Order Regarding Disposition of Petition. The disposition of a petition for violation of probation or supervised release and the facts upon which it is based shall be set forth on the form adopted by the Administrative Office of the United States Courts for

that purpose.

(e) Presentence Report and Recommendation for Revocation of Probation or Supervised Release. A Probation Officer may initiate a revocation proceeding by the Submission of a Form 12 to the Court that placed the defendant on probation or supervised release. If the Court decides that a hearing is appropriate, it shall notify the parties and the Probation Officer. The Probation Officer shall have no further contact with the Court with respect to the Form 12 prior to the hearing on the violation.

If, after a hearing, the defendant is found to have violated the terms of probation or supervised release, the Probation Officer shall prepare a dispositional report and recommendation. At least 7 days before the date set for sentencing after the Court has revoked a term of probation or supervised release, the Probation Officer shall disclose a copy of a dispositional report and recommendation to defense counsel (or to a *pro se* defendant) and to the attorney for the government, and shall lodge a copy with the sentencing Judge.

IX. SUPPLEMENTARY AND SPECIAL PROCEEDINGS

40-1. Assignment of Rule 40 Cases.

For purposes of assignment of proceedings under FRCrimP 40, the “nearest available federal Magistrate Judge” shall be deemed to be a Magistrate Judge sitting at the courthouse which serves the county in which the defendant is a resident, or, if not a resident, the county in which the defendant is physically present at the time the defendant is apprehended.

41-1. Assignment of Rule 41 Motion or Proceedings.

When no criminal case has been filed, proceedings under FRCrimP 41 shall be assigned as a miscellaneous matter to the General Duty Judge at the courthouse which, under Crim. L.R. 18-1, serves the county from which the warrant was issued. When a criminal case is pending or has been completed, proceedings under FRCrimP 41 shall bear the original case number and shall be assigned to the District Judge assigned to the pending or completed criminal case.

X. GENERAL PROVISIONS

44-1. Right to and Appointment of Counsel.

(a) **Retained Counsel.** If a defendant appears without counsel in a criminal proceeding, the Court may grant a reasonable continuance if the defendant expresses a desire to retain counsel.

(b) **Appointed Counsel.** If a defendant requests appointment of counsel by the Court, the Court shall appoint counsel in accordance with the plan of the Court adopted pursuant to the Criminal Justice Act of 1964.

(c) **Proceeding *Pro Se*.** A defendant may elect to proceed without counsel, provided the defendant waives the right to counsel in a manner approved by the Judge or Magistrate Judge. However, if requested by the *pro se* defendant, the Court may designate counsel to advise the *pro se* defendant.

44-2. Appearance and Withdrawal of Counsel.

(a) **Appearance of Counsel.** Whether retained or appointed, an attorney appearing for a defendant in a criminal case shall promptly inform the Court by either a written or oral representation on the record that he or she is making a general appearance on behalf of the defendant.

(b) **Withdrawal of Counsel.** An attorney who wishes to withdraw must file a motion to withdraw, showing good cause for allowing the attorney to withdraw. Failure of the defendant to pay agreed compensation may not necessarily be deemed good cause. Notice of the motion shall be given to the defendant and all parties to the case. The attorney continues to represent the party until entry of a court order granting leave to withdraw.

(c) **Duration of Representation.**

(1) **District Court Proceedings.** Unless such leave is granted pursuant to Crim.. L.R. 44-2(b), the attorney shall continue to represent the defendant until the case is dismissed, or the defendant is acquitted or, if convicted, until the expiration of the time for making post-trial motions and for filing notice and appeal pursuant to FRAppP 4(b).

(2) **On Appeal.** If an appeal is filed, the attorney shall continue to serve until leave to withdraw is granted by the Court having jurisdiction of the case or until other counsel has been appointed by that court as

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provided in 18 U.S.C. § 3006A and in other applicable provisions of law.

44-3. *Pro Se* Defendant in Criminal Case.

(a) **Manner of Giving Notice to *Pro Se* Defendant.** If a defendant appears *pro se*, a party shall be deemed to comply with any requirement of these local rules for giving notice to defense counsel if such notice is personally served upon a defendant who is in custody or if such notice is mailed to the last known address of a defendant who is out of custody.

(b) **Actions Required by *Pro Se* Defendant.** Any act these local rules require to be done by defense counsel shall be performed by the defendant, if appearing *pro se*.

46-1. Motions to Release or Detain.

Subject to the provisions of 18 U.S.C. §§3141-3145, 3148-3149, Magistrate Judges shall hear and determine all motions to release or detain except as otherwise ordered by the Court.

46-2. Posting Security.

When the release of a defendant is conditioned upon the deposit of cash (i.e., currency, check or money order) with the Court, such deposit shall be made with the cashier of the office of the Clerk of this Court during the regular business hours set forth in Civil L.R. 77-1(b). When the release of a defendant is conditioned upon the deposit of other security (e.g., deed of trust) with the Court, such deposit shall be made with the Magistrate Judge who set the bail or with a person designated by the Magistrate Judge in accordance with the “Guidelines in Posting Real Property as Bail in Lieu of Cash/Surety Bond; Surrendering Passports(s),” or as modified by the Court. A copy of the guideline is available from the office of the Clerk.

47-1. Motion in Criminal Case.

(a) **Types of Motions.** Any request to the Court for an order in a criminal case must be presented by:

(1) Noticed motion pursuant to Crim.. L.R. 47-2;

(2) For good cause shown, *ex parte* motion pursuant to Crim L.R. 47-4; or

(3) Stipulation of the affected parties pursuant to Crim. L.R. 47-5;

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(b) To Whom Made. Unless otherwise ordered by the assigned Judge, all motions in criminal cases shall be noticed in writing on the criminal motions calendar of the assigned Judge.

47-2. Noticed Motion in a Criminal Case.

(a) Time. Except as the assigned Judge directs or these criminal local rules require, all motions in criminal cases shall be filed, served and noticed in writing for hearing not less than 14 days after service of the motion or, if the Judge specially sets a date for hearing, not less than 14 days before the date specially set. This rule does not apply to motions during the course of trial or hearing.

(b) Format. Except as otherwise specifically provided, the format of motions shall comply with the requirements of Civil L.R. 7-2(b) and (c). Motions presenting issues of fact shall be supported by affidavits or declarations which shall comply with the requirements of Civil L.R. 7-5.

(c) Time Under the Speedy Trial Act. When filing any motion or papers concerning any matter to which an exclusion under 18 U.S.C. § 3161 may apply, the government shall indicate in a concluding paragraph entitled "Speedy Trial Act Implications," the number of days remaining before trial must commence as of the date the motion or paper is filed. If the defendant has any objection to the government's calculation, the objection and the defendant's calculation shall be stated in any response to the motion or papers.

(d) Opposition or Reply. Any opposition to a noticed motion shall be served and filed not less than 7 days before the date set for the hearing. Any reply shall be served and filed not less than 4 days before the hearing. Any opposition or reply shall comply with Civil L.R. 7-3(b), (c), (d) and (e); 7-4 and 7-5, with respect to format and length unless otherwise ordered.

47-3. *Ex parte* Motion in a Criminal Case.

(a) *Ex Parte* Motion. An *ex parte* motion is a motion filed and submitted for immediate determination by the assigned Judge without giving an opposing party the amount of advance notice which is otherwise required by statute, federal rule or local rule. Unless relieved by these local rules or by order of a Judge for good cause shown or unless being filed under seal pursuant to a statute or federal or local rules, a party making an *ex parte* motion shall nevertheless give reasonable advance notice of the motion to an opposing party.

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Cross Reference

See e.g., Crim.. L.R. 6-2 [ex parte motion re grand jury].

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(b) Form and Content of *Ex Parte* Motion. An *ex parte* motion shall contain:

(1) In one filed document not exceeding 5 pages in length, the motion, a memorandum of points and authorities which shall contain a citation to the rule or order which permits use of an *ex parte* motion to obtain the relief sought;

(2) Affidavits or declarations setting forth specific facts which support granting the requested relief without notice or with limited notice to the opposing party;

(3) A proposed form of order.

(c) Order Regarding *Ex Parte* Motion. In the exercise of his or her discretion and for good cause, the Judge may grant or deny an *ex parte* motion or request, order further notice, briefing or set the matter for hearing on the Judge's criminal motion calendar.

47-4. Stipulation.

A stipulation requesting judicial action shall be in writing signed by all affected parties or their counsel. A proposed form of order may be submitted with the stipulation and may consist of an endorsement on the stipulation of the words, "PURSUANT TO STIPULATION, IT IS SO ORDERED," with spaces designated for the date and signature of the Judge.

Cross Reference

See e.g., Crim.. L.R. 11-1(a) [stipulation to voluntary settlement conference] and Crim. L.R. 32-2(a) and (c) [stipulation to change date of sentencing].

55-1. Custody and Disposition of Exhibits.

(a) Applicability of Civil Local Rules Regarding Exhibits. Excepting contraband, firearms and other sensitive items, or unless the Judge hearing the matter otherwise orders, the procedures set forth in Civil L.R. 79-4(a) and (b) shall govern the custody and disposition of exhibits in criminal proceedings before the Court, except, without further order of a court, a party to a criminal case may take possession of the evidence that party offered upon the declaration of a mistrial.

(b) Applicability of Civil Local Rules Regarding Sealed Documents. Except for Civil L.R. 79-5(e), all other provisions of Civil L.R. 79-5 apply to the filing of documents under seal in criminal cases.

58-1. Designation of Magistrate Judges to Try Misdemeanors and Other Petty

Offenses.

Subject to the limitation of 18 U.S.C. § 3401, Magistrate Judges are specially designated to try persons accused of and sentence persons convicted of misdemeanors committed within this District. In addition, Magistrate Judges may dispose of misdemeanors which are transferred to this District under FRCrimP 20. A Magistrate Judge may direct the Probation Officer to conduct a presentence investigation of any person convicted of a misdemeanor and to render a report to the Magistrate Judge prior to the imposition of sentence.

58-2. Appeal from Conviction by Magistrate Judge.

(a) Assignment to District Judge. When an appeal from a judgment of conviction or sentence by a Magistrate Judge to a District Judge is made pursuant to FRCrimP 58(g)(2), the Clerk shall assign the appeal to a District Judge in the same manner as an indictment or felony information would be assigned.

(b) Record. If a transcript is desired by a party, the party shall order the transcript from the Court reporter in accordance with the procedure prescribed by FRAppP 10(b). If the proceedings were recorded by audio tape, the audio tape shall constitute the record of the proceedings. Upon request, the Clerk shall duplicate and provide a copy of the audio tape to the requesting party at the rate provided for in 28 U.S.C. § 1914. No transcript shall be made of an audio tape unless ordered by the assigned District Judge pursuant to motion by the requesting party. The record shall be deemed complete 10 days after the notice of appeal is filed if no transcript is ordered or upon filing of the transcript or upon lodging the audio tape with the assigned District Judge.

(c) Hearing. After the record is complete, the Clerk for the assigned District Judge shall notify the parties of the time set for hearing the appeal. The hearing shall be not more than 90 days after the date of the notice.

(d) Time for Filing and Serving Briefs. The appellant shall serve and file an opening brief not later than 60 days before the date set for the hearing pursuant to Crim. L.R. 58-2(c). The appellee shall serve and file a responsive brief not later than 30 days before the hearing date. The appellant may serve and file a reply not later than 15 days before the hearing date.

(e) Length. Unless the Court expressly orders otherwise pursuant to *ex parte* request made prior to the due date, the opening and responsive briefs shall not exceed 25 pages and the reply shall not exceed 10 pages.

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58-3. Violation Notices.

Pursuant to Rule 58(d)(1), Federal Rules of Criminal Procedure, the prosecution of petty offenses initiated by citation or violation notice shall be terminated upon receipt by the Clerk of the District Court of the amount, if any, of the fixed sum indicated as a fine on the face of the citation or violation notice. Such sums may be revised from time to time by General Order of the Court.

59-1. Effective Date.

These rules are effective May 1, 2000 and shall govern all criminal proceedings commenced on or after that date. Unless otherwise ordered by the Assigned Judge, these rules shall also be applicable to any case commenced prior to May 1, 2000, except when fewer than 10 days remain before a party must perform an act regulated by these local rules, in which case the former procedure for performing that act shall apply.